

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS ALBERTO RIVERA-DÍAZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

CIVIL 05-2089 (PG)
(CRIMINAL 04-0103 (PG))

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. INTRODUCTION

On October 13, 2005, Petitioner, Luis Alberto Rivera Díaz, filed a petition to vacate or correct sentence pursuant to 28 U.S.C. § 2255. Petitioner asserts that his appointed counsel was ineffective by failing to explain and challenge the previously negotiated two-level enhancement for abuse of a position of trust, imposed at sentencing. Rivera-Díaz also alleges that because he was in a different location, counsel delivered his file after the time to file a notice of appeal had elapsed. The government submits that petitioner stipulated the two-level enhancement and the waiver of his right to appeal.

II. PROCEDURAL BACKGROUND

"On August 5, 2004, Luis Alberto Rivera Díaz plead guilty to count one of the indictment in Criminal 04-103, which charged a violation of Title 21, United States Code, Section 846, which was a conspiracy with intent to distribute ten

1 CIVIL 05-2089 (PG)
2 (CRIMINAL 04-0103 (PG))

2

3 kilograms of cocaine.” (Docket No. 183, Sentencing Hearing, Tr. at 5, ll. 21-25.)
4
5 Based on a total offense level of 29 and a criminal history category of one, the
6 petitioner received a sentence of 87 months, with supervised release of five years
7 and a special monetary assessment in the amount of \$100 was also imposed. (Id.
8 at 6, ll. 12-25; at 8, ll. 3-4.) Petitioner claims defense counsel pressured him into
9 signing the agreement even though he did not understand the terms that he was
10 agreeing to.
11

12 III. FACTS OF THE CASE

13 At all times material to the indictment Luis Alberto Rivera Díaz was
14 employed by Ponce Airline Services (hereinafter “PAS”) at the Luis Muñoz Marín
15 International Airport (hereinafter “LMMIA”). From on or about July 23, 2003, to
16 on or about November 11, 2003, in the district of Puerto Rico, and elsewhere, and
17 within the jurisdiction of this court, the defendant Rivera-Díaz, did knowingly,
18 intentionally, and unlawfully conspire and agree with Pedro Villegas-López, Wanda
19 Rodríguez, Saulo Hernández-Morales, Kellnum Landrau-López, Melvin Popart-
20 Orengo (not indicted herein) and with diverse other persons known and unknown,
21 to possess with intent to distribute five kilograms or more of cocaine. (Docket No.
22 2, at 2; Docket No. 197, Transcript of Change of Plea Hearing, at 19, ll. 5-19.)
23
24
25

26 On or about August 30, 2003, Luis A. Rivera along with co-defendant Pedro
27 Villegas López and Wanda Rodríguez, assisted in the transportation of 10
28

1 CIVIL 05-2089 (PG)
2 (CRIMINAL 04-0103 (PG))

3

3 kilograms of purported cocaine from LMMIA in San Juan, Puerto Rico to
4 Philadelphia, Pennsylvania through US Airways Flight No. 126. (Id. at 5, ¶ 2; at
5 19, ll. 20-25.)

7 In the early morning of August 30, 2003, a DEA confidential informant
8 provided Pedro Villegas-López and Wanda Rodríguez with a piece of luggage
9 containing what they believed to be ten (10) kilograms of cocaine. The piece of
10 drug laden luggage was placed in the trunk of Wanda Rodríguez' vehicle. DEA
11 agents and the confidential informant followed Wanda Rodríguez and Pedro
12 Villegas-López to the LMMIA where they entered the airport's parking structure.
13 In the parking structure Wanda Rodríguez and Pedro Villegas-López provided the
14 petitioner, Rivera -Díaz, with the drug laden piece of luggage. Rivera-Díaz placed
15 the piece of luggage in his vehicle, then left the area and parked his vehicle in a
16 different level of the parking structure. (Docket No. 197, Tr. at 20, ll. 2-20.)
17 Rivera-Díaz then exited the parking lot with the drug laden luggage. Petitioner
18 bypassed all security checkpoints and introduced the drug laden piece of luggage
19 into the LMMIA terminal area by using his employee access car. (Id. at 20, ll. 21-
20 25.) Once inside the LMMIA Wanda Rodríguez placed the drug laden piece of
21 luggage in the luggage cart for US Airways Flight No. 126. The drug laden piece
22 of luggage was placed in the belly of U.S. Airways Flight No. 126 with destination
23 to Philadelphia, PA, where it was intercepted by the DEA. (Id. at 21, ll. 1-10.)
24
25
26
27
28

1 CIVIL 05-2089 (PG)
2 (CRIMINAL 04-0103 (PG))

4

3
4 In the plea agreement, the petitioner admitted to the fact that the penalty
5 for the offense charged in count one is not less than 10 years or more than life.
6 Additionally, the court could impose a term of supervised release of at least five
7 years and could impose a fine of up to \$4,000,000. The court was required to
8 impose a mandatory penalty assessment of \$100 per count, to be deposited in the
9 Crime Victim Fund, pursuant to 18 U.S.C. § 3013. The petitioner willingly agreed
10 that the sentence would be left entirely to the sound discretion of the court in
11 accordance with the Sentencing Guidelines, 18 U.S.C. § 3551 (hereinafter
12 "Guidelines"). (Docket No. 86, at 2, ¶¶ 2 & 3.)

14
15 The government and the petitioner agreed that he would be held
16 accountable for 10 kilograms of cocaine for purposes of determining the applicable
17 base offense level, which would result in a base offense level as listed in USSG
18 2D1.1 (c)(3) as level 32. (Id. at 3, ¶ 6a.) Since the petitioner complied with the
19 requirements of the safety valve provisions pursuant to guidelines sections 5C1.2,
20 2D1.1(b)(9) and 18 U.S.C. § 3553(f), a two level decrease was warranted. Due
21 to petitioner's abuse of position of trust, a two level increase was warranted
22 pursuant to guideline 3B1.3. Due to the fact that petitioner accepted
23 responsibility for his offense conduct, a three level decrease was warranted,
24 pursuant to guideline 3E1.1(b). (Docket No. 183, at 6, ll. 1-10.) In exchange for
25 the terms and conditions of the plea agreement the petitioner agreed to waive all
26
27
28

1 CIVIL 05-2089 (PG)
2 (CRIMINAL 04-0103 (PG))

5

3 rights under Blakely v. Washington, 542 U.S. 296 (2004). This means that the
4 petitioner agreed to have his sentence determined under the Sentencing
5 Guidelines. Thus, the petitioner waived his right to allege that the sentence given
6 to him was in excess of the maximum authorized by law. (Docket No. 86, at 4,
7 ¶ 7.) The petitioner's allegation that he was sentenced in excess of the maximum
8 authorized by law is unfounded due to the fact that the government recommended
9 he be sentenced to the lower end of the applicable guideline range. The guideline
10 imprisonment range in this particular offense is from 87 to 108 months. Petitioner
11 was sentenced to 87 months, which is the minimum in this particular case. The
12 petitioner now alleges that the guilty plea he consented to is invalid due to the
13 fact that he did not understand the terms that he was agreeing to.

14 IV. STANDARD OF REVIEW & DISCUSSION

15 "In the usual case, the crux of the inquiry is whether the plea was knowing,
16 voluntary, and intelligent in conformity with Rule 11." United States v. Martínez-
17 Molina, 64 F.3d 719, 732 (1st Cir. 1995); see United States v. Cotal-Crespo, 47
18 F.3d 1, 3 (1st Cir. 1995). It is an "accepted, unchalleng[e]able principle that a
19 [valid] plea of guilty waives all but jurisdictional defenses." United States v.
20 Chantal, 902 F.2d 1018, 1020 (1st Cir. 1990) (citing Gioiosa v. United States, 684
21 F.2d 176, 179 (1st Cir. 1982)). And, a guilty plea does not preclude a defendant
22 from subsequently asserting that his plea was involuntary (and invalid) because

1 CIVIL 05-2089 (PG)
2 (CRIMINAL 04-0103 (PG))

6

3 defense counsel's representation fell below the minimum required by the Sixth
4 Amendment. Acha v. United States, 910 F.2d 28, 30 (1st Cir. 1990). The
5 standard of review for determining effective counsel is based on the Strickland
6 test. Strickland v. Washington, 466 U.S. 668 (1984). "To meet the first part of
7 the *Strickland* test, a counseled guilty plea must be based on advice which '[i]s
8 within the range of competence demanded of attorneys in criminal cases.'"
9 López-Nieves v. United States, 917 F.2d 645, 648 (1st Cir. 1990) (quoting Hill v.
10 Lockhart, 474 U.S. 52, 56 (1985)). Once a defendant shows that counsel's advice
11 fell below this standard, he must then show that he was prejudiced by
12 demonstrating "that there is a reasonable probability that, but for counsel's errors,
13 he would not have pleaded guilty and would have insisted on going to trial." Hill
14 v. Lockhart, 474 U.S. at 59. The leading case on this issue, Strickland v.
15 Washington, discusses how a court should analyze an ineffective counsel claim:

16
17 [A] court deciding an actual ineffectiveness claim must
18 judge the reasonableness of counsel's challenged conduct
19 on the facts of the particular case, viewed as of the time
20 of counsel's conduct. A convicted defendant making a
21 claim of ineffective assistance must identify the acts or
22 omissions of counsel that are alleged not to have been
23 the result of reasonable professional judgment. The
24 court must then determine whether, in light of all the
25 circumstances, the identified acts or omissions were
26 outside the wide range of professionally competent
27 assistance. In making that determination, the court
28 should keep in mind that counsel's function, as
elaborated in prevailing professional norms, is to make
the adversarial testing process work in the particular

1 CIVIL 05-2089 (PG)
2 (CRIMINAL 04-0103 (PG))

7

3 case. At the same time, the court should recognize that
4 counsel is strongly presumed to have rendered adequate
5 assistance and made all significant decisions in the
6 exercise of reasonable professional judgment.

7 . . .

8 The reasonableness of counsel's actions may be
9 determined or substantially influenced by the defendant's
10 own statements or actions. Counsel's actions are usually
11 based, quite properly, on informed strategic choices
12 made by the defendant and on information supplied by
13 the defendant. In particular, what investigation decisions
14 are reasonable depends critically on such information.
15 For example, when the facts that support a certain
16 potential line of defense are generally known to counsel
17 because of what the defendant has said, the need for
18 further investigation may be considerably diminished or
19 eliminated altogether. And when a defendant has given
20 counsel reason to believe that pursuing certain
21 investigations would be fruitless or even harmful,
22 counsel's failure to pursue those investigations may not
23 later be challenged as unreasonable. In short, inquiry
24 into counsel's conversations with the defendant may be
25 critical to a proper assessment of counsel's investigation
26 decisions, just as it may be critical to a proper
27 assessment of counsel's other litigation decisions.

21 Strickland v. Washington, 466 U.S. at 690-91.

22 The petitioner's claim that he has been denied the right to appeal lacks any
23 basis. By entering into a plea agreement, petitioner surrendered certain rights.
24 The plea agreement stipulates that if the court accepted the agreement and
25 sentence according to its terms and conditions then he would waive and surrender
26 his rights to appeal the judgment in the case. (Docket No. 86, at 8, ¶ 17.) See,
27
28

1 CIVIL 05-2089 (PG)
2 (CRIMINAL 04-0103 (PG))

8

3 e.g., United States v. Soto-Cruz, 449 F.3d 258, 260-61 (1st Cir. 2006). On page
4 fifteen, from line five to line fourteen of the Transcript for Change of Plea, the
5 court reiterates the consequences of entering the plea agreement and petitioner
6 consents. (Docket No. 197.) On page ten, line fourteen to line 20 of the
7 Transcript for Change of Plea, the judge explains the sentencing guidelines
8 calculations, including the previously negotiated two-level enhancement for abuse
9 of a position of trust. In response to whether petitioner understands the
10 descriptions of the sentencing guidelines petitioner responds in the affirmative.
11 On page thirteen, line sixteen of the Transcript for Change of Plea, the judge
12 inquires as to the effective legal counsel rendered by petitioner's attorney.
13 Petitioner affirms he is satisfied with his representation. On page eight, line
14 seventeen to nineteen (19), the judge inquires as to whether anyone has forced
15 petitioner to plead guilty. Petitioner responds in the negative. (Docket No. 197.)
16 The fact that petitioner willingly consented to all the terms of the plea agreement
17 and during the proceedings before the court affirmed that he understood the
18 ramifications of the plea agreement, renders his claim of ineffective counsel
19 unfounded.
20
21
22
23

24 Following the Strickland test, petitioner fails to show how any of the issues
25 raised would have been decided in his favor or that the outcome of the trial would
26 have been different but for his counsel's failure to raise these issues. Strickland
27
28

1 CIVIL 05-2089 (PG)
2 (CRIMINAL 04-0103 (PG))

9

3 v. Washington, 466 U.S. at 714. Similarly, petitioner fails to show any prejudice
4 resulting from the alleged error of not understanding the two-level enhancement
5 in sentencing.
6

7 Petitioner does not meet the Strickland test requirement that there is a
8 reasonable probability that, but for counsel's errors, petitioner would not have
9 pleaded guilty and would have insisted on going to trial.
10

11 Petitioner's allegation that counsel delivered his file after the time to file a
12 notice for appeal had elapsed is academic since Rivera-Díaz has waived his right
13 to appeal in the plea agreement. I therefore recommend that the court deny
14 petitioner's motion under 28 U.S.C. § 2255.
15

16 Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico, any
17 party who objects to this report and recommendation must file a written objection
18 thereto with the Clerk of this Court within ten (10) days of the party's receipt of
19 this report and recommendation. The written objections must specifically identify
20 the portion of the recommendation, or report to which objection is made and the
21 basis for such objections. Failure to comply with this rule precludes further
22 appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Davet v.
23 Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992); Paterson-Leitch Co. v. Mass. Mun.
24 Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988); Borden v. Sec'y of Health &
25 Human Servs., 836 F.2d 4, 6 (1st Cir. 1987); Scott v. Schweiker, 702 F.2d 13, 14,
26
27
28

1 CIVIL 05-2089 (PG) 10
2 (CRIMINAL 04-0103 (PG))

3 (1st Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); Park
4 Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).
5

6 At San Juan, Puerto Rico, this 21st day of December, 2006.
7

8 S/ JUSTO ARENAS
9 Chief United States Magistrate Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28